No. 14331

In the United States Court of Appeals for the Ninth Circuit

ARTHUR A. ARNHOLD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE

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INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Statutes—Continued

Miscellaneous—Continued

Miscellaneous—Continued

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JURISDICTIONAL STATEMENT

Appellants brought this action against the United States under the provisions of the Federal Tort Claims Act [1] in the United States District Court for the Western District of Washington, Northern Division (R. 3-63). On March 1, 1954 an order dismissing the complaint with prejudice was entered in favor of the United States (R. 80-81). On March 31, 1954, notice

[1] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U.S.C. 921 *et seq.* While subsequently repealed, its provisions were reenacted into law, under the revision of the Judicial Code, as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

of appeal was filed (R. 82). The jurisdiction of this Court rests upon 28 U. S. C. 1291 and 1294(1).

STATEMENT OF THE CASE

In this action, appellants seek to recover damages against the United States, the Port Angeles Western Railroad, the Railroad's trustee in reorganization and Fibreboard Products Incorporated, a Delaware corporation, for property loss allegedly sustained as a result of a forest fire in Clallam County, Washington (R. 4-63). The appeal is from a judgment dismissing the complaint as to the United States (R. 80-81).[2]

Summary of the allegations of fact in the fourth amended complaint. The Port Angeles Western Railroad maintains a right of way through the Olympic National Forest west of Crescent Lake in Clallam County, Washington (R. 6). On and prior to August 6, 1951, large quantities of dry grass and other combustible herbiage were present on the right of way; many of the trees in the roadbed were old and rotted; and discarded rotted trees, slash, and other inflammable material lay in close proximity to the roadbed (R. 6). This was known to the officers of the Railroad (R. 6). It was also known to employees of the Forest Service of the U. S. Department of Agriculture who failed to require the Railroad to abate these hazardous conditions although the United States reserved the right to do so and had on prior occasions exercised that right (R. 8). Additionally, slashings had accumulated upon

[2] This case involves the same series of events and presents basically the same claim as *Rayonier* v. *United States* which also is now pending on appeal in this Court (14329). While the Government's position is virtually identical in both cases, our briefs differ in some respects; e.g., in the footnote material here we consider the contentions peculiar to these appellants.

portions of the national forest upon which the United States, through the Forest Service, bought, sold and traded timber for a profit (R. 8, 9).

On or about about noon on August 6, 1952, a Port Angeles Western Railroad steam powered locomotive proceeding in an easterly direction along the right of way threw sparks and fire into the dry grass, combustible herbiage, and rotten trees in and near the tracks, igniting this material in at least six places (R. 6). The locomotive was not afforded a follow-up patrol nor was fire fighting equipment stationed by the railroad along the right of way (R. 7). Further, after the fires broke out the Railroad made no effort to extinguish them although the crew of the train could have easily done so (R. 7). The United States knew or should have known that the railroad was not regularly employing a follow-up patrol but, although it had reserved the right to do so, it did not require such a patrol on August 6, 1951 (R. 8).

The State of Washington and the United States had entered into an agreement whereby the latter was to furnish fire protection in the area of the Olympic Peninsula by assuming the duties and privileges of state fire wardens, including the right to conscript and impress men and equipment for fire suppression (R. 10). Upon receipt of a report of the outbreak of one of the fires in the railroad roadbed, District Ranger Floe of the Forest Service dispatched men to control it (R. 11). These men were insufficient in number and took insufficient equipment with them (R. 11). Sufficient men and equipment were available on two hours notice (R. 11).

It is further alleged that, on the morning of August 7, 1951, Floe dispatched further men and equipment

which arrived on the scene of the fire at 7:00 A.M. (R. 12). They could and should have been summoned so as to have commenced fire fighting operations at 4:00 A.M. when daylight first appeared (R. 12). Moreover, Floe did not call upon the amount of available men and equipment called for by the Fire Suppression Plan which was in effect at that time and which had been approved by the Regional Supervisor of the Forest Service (R. 12).

On the afternoon of August 7, an ordinary breeze caused the fire to cross inadequately constructed and undermanned and equipped fire lines and to escape onto a 1600 acre area which included lands owned by Fibreboard Products (R. 13). Floe, and the men working under his direction, brought the fire under control on or about August 10, 1951, but neither Floe nor Fibreboard took sufficient precautions and adequate action in respect to containing and extinguishing it within the 1600 acre area (R. 13-15).

Early on the morning of September 20, 1951, a northeast wind of not unusual force fanned smouldering fires on Fibreboard's land with the consequence that the fires spread rapidly in a southwest direction (R. 15, 19). During the following twenty-four hours, property owned or insured by appellants was damaged or destroyed (R. 15).

Proceedings in the court below. On February 19, 1954, on which date appellants' third amended complaint was still outstanding, the United States filed a motion for judgment on the pleadings on the grounds that the complaint failed to state a cause of action and that the District Court lacked jurisdiction over the subject matter of the action (R. 79-80). On February

27, 1954, the fourth amended complaint was filed (R. 63). On the same date, the Government's motion came on for hearing and, by stipulation, it was directed to the fourth amended complaint (R. 86, 89). After argument, the District Court granted the motion on the ground that the complaint did not state a cause of action under the Federal Tort Claims Act and, on March 1, 1954, an order was entered dismissing the cause with prejudice (R. 80-81). In his oral remarks from the bench, Judge Boldt cited *Dalehite* v. *United States,* 346 U. S. 15 and *National Manufacturing Co.* v. *United States,* 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967 (R. 92-93).

ARGUMENT

Introductory Statement

The court below has held that appellants' complaint fails to state a claim upon which relief may be granted under the Tort Claims Act. That holding is correct in every respect. As will be demonstrated, neither the Act itself nor, insofar as it is applicable, the law of the State of Washington permits the imposition of liability upon the United States by reason of the asserted act and omissions of employees of the Forest Service which form the basis of the instant claim.

In Point I below, we discuss the allegations of the complaint in respect to the purported failure of the United States to compel the Port Angeles Western Railroad to remove combustible matter from its right of way and to observe certain safety practices. For the purposes of this discussion, we can assume *arguendo* that appellants are right in suggesting that the United States, as the owner of the Olympic National

Forest, may be analogized to the owner of private property and that the provisions of Washington statutes may be deemed to govern the administration of federally owned public lands. For, as will be shown, neither under these statutes nor under the common law would a private landowner be responsible for the condition or manner of use of a railroad right of way running across his property. Furthermore, the fact that the United States may have reserved the privilege of requiring the Railroad to maintain its right of way in a safe condition and to conduct its operations on that right of way in a safe manner hardly implies the existence of legal duty to do so.

In Point II we turn to the allegations in the complaint in respect to the presence of combustible matter on national forest land adjoining the right of way. We show in this connection that the Washington statute relied upon by appellants, which imposes absolute liability upon a landowner for the mere presence of such matter on his property whether he is responsible for its existence or not, may not serve as the basis for a claim under the Tort Claims Act. Additionally, it will be shown that the common law imposes no duty under which a property owner would be civilly liable solely by reason of the presence of combustibles on his land in circumstances where the fire causing the damage did not originate on that property, or where the damage to third persons was not proximately caused by the combustibles. In this regard, it is to be noted that the complaint here does not contain the specific allegation that the inflammable matter on the national forest was the result of activities undertaken by the United States. Nor do the allegations of fact indicate that the proxi-

mate cause of the injury to appellants' property was the purported presence of combustibles on the national forest.

In Point III will be considered the allegations concerning developments subsequent to the outbreak of the forest fire on August 6, 1951. We shall demonstrate that the fire suppression activities were undertaken by employees of the Forest Service in their capacity as public firemen and that, as a consequence, their asserted negligence in the performance of these activities does not give rise to liability under the Tort Claims Act. Insofar as the agreement between the United States and the State of Washington calling for fire protection in the Olympic Peninsula area is concerned, that agreement merely emphasizes the public nature of the fire fighting endeavors of the Forest Service and, in any event, does not create an actionable duty upon the part of the United States running to these appellants. Finally, the Washington statutes and judicial decisions relied upon by appellants, even if they may be considered applicable, do not support the theory that the United States as owner of the national forest breached a duty owing appellants by reason of the asserted negligence of the Forest Service in fighting the fire.

I

Neither Statutory Nor Common Law Liability Can Be Imposed Upon the United States by Reason of the Alleged Combustible Matter on the Railroad's Right of Way.

It is not disputed that the forest fire occasioning the damage complained of was caused by the ignition of combustible material on the right of way maintained by the Port Angeles Western Railroad across the

Olympic National Forest. It is also unchallenged that the ignition resulted from a spark from a steam locomotive owned and operated by the Railroad. Appellants urge, however, that by reason of its ownership of the national forest, the United States was charged with the responsibility of keeping the railroad right of way clear of combustible matter. From this, appellants proceed to the conclusion that by failing to abate the fire hazard which the Railroad created and continued in violation of both the common law and Washington statutes, the Government itself became answerable under the Tort Claims Act for the consequences of any fire resulting from the Railroad's negligent operations on the right of way.

The difficulty with this line of reasoning lies in the invalidity of the premise that the United States owed a duty to these appellants in respect to the right of way. This in turn stems from a total misconception of the nature of the Railroad's interest in the right of way and the legal duties concomitant with that interest.

A. *The Port Angeles Western Railroad's Right of Way Through The Olympic National Forest Is An Easement Through Public Lands.*

The right of way possessed by the Port Angeles Western Railroad across the Olympic National Forest, in common with other rights of ways held by railroads on the public domain, was granted by the United States pursuant to the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U. S. C. 934. This statute, which patently wes designed to aid in the expansion of railroad and telegraph facilities, provides as follows:

> The right of way through the public land of the United States is granted to any railroad company

> duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

The question of the extent of the railroad's interest in a right of way granted under the Act has been considered by the Supreme Court on several occasions, most recently in *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262. In the *Great Northern* case the Court, after a reference to the legislative history of the Act, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments, held unequivocally that railroads enjoy an easement in their rights of way on public lands. This holding was followed by this Court in *Himonas* v. *Denver & R. G. W. R. Co.,* 179 F. 2d 171.

The present administrative construction of the character of the grant fully accords with the judicial view. The regulations of the Department of Interior pertaining to rights of way advise railroads that while they do

not possess a full and complete title to the land over which the right of way is located, they do enjoy the right to use the land for the purposes for which the grant was made and may hold possession for as long as that use continues. The regulations give further assurance that, if the Government conveys the fee simple title, the patentee will take subject to the railroad's right of use and possession. And persons settling on a tract of public land also take subject to any existing right of way. See 43 C. F. R. (1949 ed.) 243.2.

B. *At Common Law the Responsibility For Maintenance of an Easement Rests Solely Upon the Owner of the Dominant Estate.*

1. Since the Port Angeles Western Railroad was the possessor of an easement as to the land upon which it maintained its right of way, the United States was under no common law obligation to maintain, repair, or otherwise keep it in good condition. It is too well settled to be open to question here that, in the absence of a contract specifying the duties and obligations of the dominant and servient owners with respect to the easement, the holder of the servient estate owes no obligation either to the dominant owner or to third parties to make repairs. Instead, the duty devolves upon, and solely upon, the owner of the easement to maintain the dominent estate and to insure that it remains in good condition. See *e.g. Reed* v. *Allegheny Co.,* 330 Pa. 300, 303, 199 Atl. 187; *Herzog* v. *Grosso,* 41 Cal. 2d 219, 259 P. 2d 429; *Strauss* v. *Thompson,* 175 Kan. 98, 259 P. 2d 145; *City of Bellevue* v. *Daly,* 14 Idaho 545, 549, 94 Pac. 1036; *Hastings* v. *Chi, R. I. & P. Ry. Co.,* 148 Iowa 390, 126 N. W. 787; *Herman* v. *Roberts,* 119

N. Y. 37, 23 N. E. 442. See also 2 *American Law of Property*, § 866; *Jones on Easements* (1898) § 831.[3]

Thus, if there is substance to the allegations in appellants' complaint regarding the condition of the right of way, it is the Railroad alone that has breached a common law duty. To maintain a right of way in proper condition is, among other things, to keep it free of unnecessary fire hazards. And where the Railroad fails to do so, and a fire is started thereon by sparks from one of its locomotives, Washington law makes it unmistakably clear that it is liable for any damage occurring to adjoining property. This is true even if there is no negligence in equipping and operating the engine. See *e.g. Abrams* v. *Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78; *Fireman's Fund Ins. Co.* v. *Northern Pacific R. Co.*, 46 Wash. 635, 91 Pac. 13; *Slaton* v. *C. M. & St. P. R. R.*, 97 Wash. 441, 166 Pac. 644.[4]

2. That the United States may have, in its grant to the Railroad, reserved the *right* to enter upon the premises, or to require the Railroad to remove combustibles from the right of way, does not affect the applicability of these principles. As the complaint tacitly concedes, the reservation did not contain an agreement by the Government to assume the Railroad's responsibility as holder of the easement to abate fire hazards and generally keep the property in good order. And, as noted above, such an agreement is an absolute condition precedent to imposing common law liability upon the ser-

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[3] As the Pennsylvania Supreme Court put it in the *Reed* case [330 Pa. at 303]:

> Ordinarily [i.e., in the absence of contract] the owner of a servient estate is under no obligation to make repairs; the duty is upon the one who enjoys the easement to keep it in proper condition, and *if he fails to do so and injury to third persons results, he alone is liable.* [Emphasis supplied]

4 See next page

vient rather than the dominant owner for injury resulting from faulty maintenance of an easement.

The motivation behind the reservation of a right of entry is not difficult to envisage. The easement having been granted for the limited purpose of use as a railroad right of way, the Government must be in a position to make certain that no other and unauthorized use is being made of it. Cf. *Great Northern R. Co.* v. *United States, supra.*[5] Additionally, because the failure of the Railroad to take adequate safety precautions in the operation of its trains and the maintenance of the right of way affects or endangers in the first instance the adjoining forest lands owned by the United States, the Government understandably desires, for its own benefit, the opportunity to ascertain the manner in which the Railroad conducts its affairs on its easement.

The short of the matter is therefore that the right of entry, admittedly not coupled with an agreement to abate fire hazards or even an agreement to assume a duty of inspection of the right of way, is simply for the protection of the Government. As such, appellants cannot claim the benefit of it; nor does it disturb the force of the normal rule that third persons must look to the owner of the dominant estate if the condition or use of the estate causes harm to them.

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[4] The Washington rule is of course not unique. The failure to keep its right of way clear from combustible matter will in virtually every jurisdiction impose liability upon the railroad if the combustibles are ignited by sparks from a locomotive. See cases cited 18 A.L.R. 2nd 1090 *et seq.*, 42 A.L.R. 799 *et seq.* We know of no occasion where in similar circumstances liability was additionally imposed upon the possessor of the servient estate, *i.e.* the owner of the land across which the right of way is maintained.

[5] In the *Great Northern* case, the United States sought to enjoin the railroad from drilling or removing oil, gas or minerals under-

C. *The Owner of the Servient Estate Is Under No Statutory Duty in Washington to Keep an Easement Free of Combustible Matter.*

Because the railroad right of way crosses the Olympic National Forest, appellants additionally urge that the United States was under a statutory duty to keep the right of way clear of inflammable debris and to abate any hazard thereon. In this connection reference is made by appellants to Sections 5807 and 5818 of the Remington Revised Statutes (R.C.W. §§ 76.04.370, 76.-04.450) *infra*, pp. 48-49. The former provides that land covered by inflammable debris shall constitute a fire hazard and requires the owner and the person, firm or corporation responsible for the existence of the hazard to abate it. Section 5818 declares it unlawful for any firm, person, company or corporation to do or commit any act which shall expose the forest or timber of the Olympic Peninsula to the hazard of fire.

Since it is not alleged that the Government committed any act upon the railroad right of way which contributed to the purported fire hazard thereon, we do not deem it necessary to consider Section 5818 at length here. And, insofar as Section 5807 is concerned, we submit that appellants err in contending that it gives rise to an obligation upon the part of a landowner to keep a railroad easement running across his property free of combustible matter.

What appellants' position amounts to is that, without expressly so stating, Section 5807 drastically

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lying its right of way. The Court ruled that the Great Northern's easement for railroad purposes did not confer rights to materials below the surface of the right of way.

changes the common law so as to impose upon a servient owner civil liability for the act or omissions of the owner of the dominant estate. Indeed, their theory goes even further than that. Section 5807 is a criminal statute.[6] Consequently, to interpret it as appellants suggest would be to hold a servient owner criminally responsible for statutory violations upon the part of the dominant owner, even though, unlike a landlord-lessor, the former in the absence of a contractual stipulation to the contrary has no duties with respect to the easement except the negative one of not interfering with the latter's use. See *e.g., Bina* v. *Bina,* 213 Iowa 432, 239 N.W. 68; *Herman* v. *Roberts,* 119 N.Y. 37, 23 N.E. 442; *Moffett* v. *Berlin Water Co.,* 81 N.H. 79, 121 Atl. 22; *Jones on Easements* (1898) § 831.

This consideration alone, we think, would explain the inability of appellants to point to a single judicial decision, either in Washington or elsewhere, which reads the term "owner" in a safety statute of this character as encompassing the servient owner of property under easement. But there are still additional compelling reasons why the scope of the term is properly limited to persons entitled to present possession—whether or not that possession has been alienated under a lease, license or similar agreement. If, for example, the United States by virtue of its two incidents of ownership of the land constituting the right of way (*i.e.,* a reversionary interest on cessation of use of the right of way for railroad purposes and a right to prevent the railroad from using it for other than these purposes)

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[6] The violation of certain sections of title 36 of the Remington Revised Statutes, including Section 5807, constitutes a misdemeanor. See Section 5821 (R.C.W. § 76.04.480).

is to be held accountable as "owner" here, it would seem to follow logically that any holder of (a) a right of entry for condition broken, (b) a reversionary interest or (c) a contingent or vested remainder in forest land would similarly be an "owner" and liable for violations of the statute by the party in possession. Such a result would not only be absurd but also would plainly conflict with the established principle, followed in Washington, that a criminal statute must be strictly construed. See *e.g., State* v. *Furth,* 82 Wash. 665, 678, 144 Pac. 907; *State* v. *Levy,* 8 Wash. 2d 630, 651, 113 P. 2d 306.

Moreover, while the justification for holding a lessor of timber lands accountable for fire hazards created by his lessee is apparent, the same cannot be said with respect to the servient owner of land under railroad easement. In the first place, it is equitable as well as necessary that the lessor, who after all directly benefits through rent from the forest operations of the lessee on his land which give rise to the hazard, share in the responsibility for its elimination. Secondly, the typical lease or license agreement is one for a defined limited period of time, at the conclusion of which possession of the land reverts to the owner. Consequently, the lessor out of possession will never be confronted with the necessity of assuming *in perpetuity* the burden of policing another's activities.

This is not the situation where possession of land is taken under the grant of an easement, especially where the easement is in the nature of a railroad right of way. The dominant owner, much like the owner of a determinable fee, takes possession in perpetuity, "to have and to hold" so long as the easement is used

for the purpose granted. See pp. 9-10, *supra*. This means that the servient owner and his successors in interest, if the statute were applicable to them, would have an uninterrupted responsibility for the condition of the surface of land which in all likelihood they will never regain possession of and from which, at the same time, they stand to derive no benefit. We think that it would take much more than Section 5807 as it now stands to attribute any such intent to the legislature.

II

The Allegations in the Complaint Respecting the Presence of Combustible Matter on Lands Adjoining the Right of Way Do Not State a Cause of Action Under the Tort Claims Act.

In addition to the allegations regarding the combustible matter on the railroad right of way, appellants' complaint asserts that there were slashings on Government lands adjoining the right of way. Again relying on Section 5807 and 5818 of the Remington Revised Statutes, see *supra* p. 13, and upon the common law, appellants urge that the mere presence of the combustibles calls for the imposition of liability upon the United States for the damage done to their property by the fire.

A. *The Washington Statutes Relied Upon by Appellants Cannot Serve as the Basis for a Claim Under the Act.*

There is no need to dispute that as to lands adjoining the railroad right of way, in contrast to the right of way itself, the United States is the "owner" within the meaning of Section 5807. Nor do we question that under the allegations of the complaint a private land-

owner in like circumstances would be susceptible to criminal prosecution irrespective of whether the fire hazard was created by affirmative acts on the part of himself or his employees, or instead was the result of the conduct of a third party—perhaps even a trespasser.

Indeed, in contrast to its predecessor, which conditioned criminal liability upon the prior receipt of official notice of the existence of the fire hazard,[7] Section 5807 in terms imposes absolute criminal liability on the owner of land containing such a hazard solely because of his ownership. And it is for this reason that, even assuming that the Section looks to civil liability as well, it may not be invoked as a basis for recovery under the Tort Claims Act. Under the Act, the United States has consented to be sued only "for the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment". 28 U. S. C. 1346(b), *infra,* p. 47. Cf. pp. 31-32, *infra.* Thus, the waiver of immunity does not extend to situations where the claim is grounded upon either a statute or common law doctrine which imposes absolute liability without fault. This was expressly recognized in *Dalehite* v. *United States,* 346 U.S. 15, 44-45, where the Supreme Court observed:

> * * * there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's find-

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[7] Prior to its amendment in 1939, Section 5807 provided that land covered by inflammable debris "shall, if so declared by the supervisor of forestry, constitute a fire hazard * * *." Notice of the existence of such hazard and of the requirement for its abatement had to be then transmitted in writing to the landowner and/or the person, firm, or corporation responsible for its existence.

> ing that the FGAN constituted a nuisance, and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeaser conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. *So it is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or property,* or of engaging in an "extra-hazardous" activity. *United States* v. *Hall,* 195 F. 2d 64, 67. [Emphasis supplied]

And the *Dalehite* holding since has been applied by the Third, Fifth and Tenth Circuits in refusing to extend the Tort Claims Act to liability without fault situations. See *Heale* v. *United States,* 207 F. 2d 414 (C. A. 3); *United States* v. *Inmon,* 205 F. 2d 681, 684 (C. A. 5); *Harris* v. *United States,* 205 F. 2d 765, 767 (C. A. 10).[8]

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[8] The above considerations of course would be equally applicable to appellants' claim grounded upon the alleged statutory violations on the railroad right of way. It was not necessary to discuss them in that connection because, as seen, the statute does not impose liability upon a servient owner for fire hazards left on an easement by the dominant owner.

B. *An Adjoining Landowner Is Under No Common Law Duty to Guard Against the Negligent Act of a Railroad on Its Right of Way.*

Because of the above considerations, appellants must demonstrate that under the allegations of the complaint common law liability would exist. This they cannot do.

It was long settled at common law that a landowner had an almost unlimited right to use his property as he saw fit. See *e.g.,* cases cited 12 L. R. A. (N. S.) 624. This meant that a property owner might store inflammable material on his land without incurring liability for the spread of a fire from adjoining land through the material onto other adjoining land. See *Bowers* v. *East Tennessee & W. N. C. R. Co.,* 144 N. C. 684, 57 S. E. 453. It similarly meant that a railroad which negligently had set fire to inflammable matter on neighboring property could not plead the presence of the matter as contributory negligence.

This is well illustrated by the decision of the Supreme Court in *Leroy Fibre Co.* v. *Chi., Mil., & St. P. Ry.,* 232 U. S. 340. There, the fibre company brought suit against the railroad to recover for the destruction of inflammable flax straw which had been stacked on the fibre company's property adjacent to the right of way and which had become ignited by a spark from a railroad locomotive. One of the questions certified to the Supreme Court was whether it was for the jury to decide if the flax straw owner was held to the exercise of reasonable care to protect the straw from a fire set by the negligence of the railroad. The Court held that it was not, observing that the fibre company was under no duty to conform its use of its own property to the

possibility of wrongful acts by the railroad on the right of way.

It is quite true that in recent years the common law rule has been somewhat modified. Some jurisdictions now adhere to the view that a landowner is responsible for damage to adjoining land from a fire originating in combustibles on his property, even if the fire started as the result of a negligent act of a trespasser on the property. Thus in *Prince* v. *Chehalis Savings & Loan Association,* 186 Wash. 372, 58 P. 2d 290, *affirmed on rehearing* 186 Wash. 377, 61 P. 2d 1374, the owner of a garage was held liable for the spread of a fire starting in his abandoned garage in circumstances where the garage was left in a state of disrepair and was used at night by itinerants. And in *Arneil* v. *Schnitzer,* 173 Ore. 179, 144 P. 2d 707, the same result was obtained where owners of a sawmill allowed inflammable debris to accumulate and an itinerant, entering upon the property, discarded a lighted cigarette in the vicinity of the debris.

At the same time, however, there was no suggestion in these cases that the common law rule was to be further modified to hold the owner accountable where, as here, the acts of negligence causing ignition of the combustibles take place on an adjoining railroad right of way. And while the Washington courts have not been confronted squarely with that question, it has been considered recently in California. In that jurisdiction, a landowner remains under no duty, in the use of his property, to guard against negligence by the railroad in the operation of its trains on a right of way. See *Atlas Assurance Co. Ltd.* v. *State,* 102 Cal. App. 2d 789, 229 P. 2d 13, 17, 19. Cf. *Kleinclaus*

v. *Marin Realty Co.*, 94 Cal. App. 2d 733, 211 P. 2d 582, 583-584. We know of no holding in any jurisdiction to the contrary.

C. *The Allegations of Fact Do Not Indicate A Causal Relationship Between The Presence of The Combustible Matter And The Damage Complained Of.*

While, in light of the foregoing, appellants' claim grounded upon the purported accumulation of slashings on the lands adjoining the right of way would fail in any event, we think it bears mentioning that the complaint does not allege facts sufficient to indicate a causal relationship between the presence of the inflammable debris and the damage that was sustained by appellants. True enough, there is a sweeping conclusion that this damage was the proximate result of the myriad acts of negligence charged to the Government, the Railroad, and Fibreboard (R. 22). But, in advancing appellants' version of events in some detail, the complaint fails to refer to a single fact which, if true, would suggest that the purported slashings had the remotest bearing upon the spread of the forest fire onto appellants' land. On the contrary, it does not even appear, either directly or by reasonable inference, that the slashings caught fire at all.[9]

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[9] The single specific reference to the slashings on Government lands is in paragraph XI of the complaint which merely alleges their presence and the existence of certain Washington forest safety statutes (R. 8, 9). In their allegations against the Railroad, appellants take care to point out that the fire originated in inflammable debris in and near the tracks on the right of way (R. 6). Yet the complaint is silent with respect to the ignition, at any time, of the slashings referred to in paragraph XI; let alone that the fire would not have spread but for the presence of the slashings. Cf. *Burr* v. *Clark*, 30 Wash. 2nd 149, 190 P. 2d 769. And, even if this

It is of course basic to the law of torts that an act of abstract negligence cannot support the imposition of liability; facts must further be alleged and proved demonstrating that damage was proximately caused by the negligence. *Prosser on Torts,* pp. 177, 311 *et seq;* Green, *Rationale of Proximate Cause* (1927), pp. 3, 4. "Legal" or "proximate" cause is therefore an essential element of any cause of action sounding in negligence, whether it be based on the asserted violation of a common law duty or of a statute. Nor does it matter that the statute relied on imposes absolute liability or characterizes violations as "negligence per se". In either case, liability in tort is still entirely dependent upon a showing that the harm proximately resulted from the violation. See *e.g. Schatter* v. *Bergen,* 185 Wash. 375, 55 P. 2d 344.

III

Liability May Not Be Imposed Upon the United States Under the Tort Claims Act for the Asserted Negligence of the Forest Service in Fighting the Fire.

For the reasons developed above, it is plain that liability may not be imposed upon the United States for the consequence of the forest fire because of the alleged presence of combustible matter upon the railroad right of way and adjoining portions of the Olympic National Forest. The remaining question is whether the Tort Claims Act may be invoked to recover damages for the asserted failure of Forest Service personnel to fight properly the fire. We now demonstrate that the answer to the question is, as the District Court

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debris had burned, the fact remains that the fire was under control in a 1600 acre area for over a month before a wind caused it to spread further and damage appellants' property (R. 13, 15).

held, in the negative. This follows from the fact that the actions of the Forest Service complained of were undertaken in the Service's capacity as a public fireman and, under the decision of the Supreme Court in *Dalehite* v. *United States,* 346 U. S. 15, claims grounded upon the performance of strictly governmental functions of this character are excluded from the coverage of the Tort Claims Act.

A. *The Actions of the Forest Service Personnel in Fighting This Forest Fire on Public and Private Land Were Those of Public Firemen.*

In their brief here (Br. p. 62), as in the court below, appellants attempt to characterize the fire suppression endeavors of Ranger Floe and his subordinates as merely the acts of a landowner upon whose property a fire has developed. As even a sketchy examination into the historical background and present functions of the Forest Service will reveal, however, nothing could be farther removed from the actualities of the matter. Even if in any of the phases of its wide-spread and complex activities the Forest Service appropriately could be analogized to the caretaker of private property, in its effort to prevent and suppress fires on forest land it serves the public at large as do local fire departments maintained by cities and towns to protect the property of their residents. And the Forest Service's operations in this important field can scarcely be dismissed as incidental; as will be seen they command, and deservedly so, a large measure of attention in the continuing effort by the Service, under its Congressional mandate, to further the conservation of forest resources essential to the general welfare.

1. Following the recommendations over a period of years of leading conservationists, who believed that such a step was essential to the preservation of the nation's timber supply, Congress in 1891 authorized the President to set apart and reserve forest lands of the public domain, whether bearing commercial timber or not, in any state or territory where such land is located. Act of March 3, 1891, c. 561, §§ 24, 26 Stat. 1103, as amended, 16 U. S. C. 471. Almost immediately thereafter, on March 30, 1891, President Harrison exercised this authority by proclaiming the Yellowstone Park Timberland Reserve. During the balance of the Harrison administration, and the subsequent Cleveland administration, several additional reservations were made.[10]

In spite of its clear purposes in terms of conservation, the 1891 Act made no provision for the protection and administration of the forest reserves; nor did it provide any regular method whereby the developing principles of forest management could be applied thereto. This deficiency was remedied in the Sundry Civil Appropriations Act of June 4, 1897, 30 Stat. 35, which stipulated that the Secretary of the Interior shall "make provisions for the protection against destruction by fire and depredation upon the public forests and forest reservations" and "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction". The Secretary

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[10] See Sparhawk, *The History of Forestry in America*, The Yearbook of Agriculture (U.S. Department of Agriculture, 1949), 702, 706.

of the Interior immediately undertook the administration and protection of the reservations, assigning the task to the then General Land Office which appointed a field force of supervisors and rangers.[11] The managerial responsibility remained in the Department of the Interior until 1905 when Congress transferred it to the Department of Agriculture, where it was placed in the hands of the Bureau of Forestry.[12] This Bureau, which was headed by Gifford Pinchot (one of the foremost American conservationists), became the Forest Service later in the same year and, in 1907, the forest reserves were renamed National Forests.[13]

At the time that the administration of the national forests evolved to the Forest Service, the then Secretary of Agriculture advised the Service in a formal communication to Chief Forester Pinchot that "it must be clearly bourne in mind that [these forests] are to be devoted to [their] most productive use for the permanent good of the whole people."[14] For the past fifty years, this principle has been the Service's watchword in carrying out the duties in respect to the forests, which now are more than 150 in number and cover a total area in excess of 180 million acres.[15] We cite here but a few examples. Timber management plans have been placed into effect to guide the growing and harvesting of timber crops in such a manner as will furnish

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[11] *Id.* at p. 709. See also, *Our National Forests* (U. S. Department of Agriculture Information Bulletin No. 49, (1951)), p. 2.

[12] Act of February 1, 1905, c. 288, 33 Stat. 628. See also *Our National Forests, supra,* n. 11, at p. 2.

[13] *Our National Forests, supra,* n. 11, at p. 2. See also Act of March 3, 1905, 33 Stat. 872.

[14] *Id.* at p. 4.

[15] *Id.* at p. 3. See also Annual Report of the Secretary of Agriculture (1952), p. 18.

"continuous supplies of timber for the people of the United States." Range resources have been controlled to assure the best possible supply of forage year after year. Forestry and farming practices designed to protect watersheds and help prevent disastrous flood conditions have been put into effect. Recreational areas have been established for the use and enjoyment of outdoor enthusiasts. And the search is continuous for methods and means of increasing further the productivity of all national forest land.[16]

While national forest timber is sold to private individuals, such sales are permitted only in circumstances where the cutting and removal of the timber will serve the purpose of "preserving the living and growing timber and promoting the younger growth in national forests." Act of June 4, 1897, as amended, 30 Stat. 35, 16 U. S. C. 476. Furthermore, the overall administration of the national forests produces an annual deficit for the Treasury.[17] This deficit is enlarged by reason of the Congressional proviso that 25% of all moneys received from each national forest shall be paid to the state in which the forest is situated, to be

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[16] These and other functions of the Forest Service are described in some detail in *The Work of the U. S. Forest Service* (U. S. Department of Agriculture Information Bulletin No. 91 (1952)), pp. 5-20.

[17] In the fiscal year 1950, for example, the Forest Service spent approximately 37 million dollars in the operation, management and protection of the national forests. National forest receipts during the same period totaled nearly 34.5 million dollars. *Our National Forests*, *supra*, n. 11, at p. 26.

While this serves to bring the nature of the Government's operation of the national forest system into better perspective, as will be seen below it does not matter for the purposes of the Tort Claims Act whether the national forests are managed on a profit or non-profit basis.

expended by the state for the benefit of public schools and roads. Act of May 23, 1908, c. 792, 35 Stat. 260, as amended 16 U. S. C. 500. And an additional 10 per cent of the receipts is available for expenditure on national-forest roads and trails in the state of origin. Act of March 4, 1913, 37 Stat. 843, 16 U. S. C. 501.

2. At the same time that the interests of conservation were being furthered through the development and expansion of the national forest system, there was an increasing awareness of the dire necessity of cooperation between federal and state governments in among other things the matter of providing protection against forest fires, *irrespective of their place of occurrence.* This awareness manifested itself first in the 1908 enactment of a statute directing the Forest Service to aid in the enforcement of the laws of the states and territories with regard to the prevention and extinguishment of forest fires. Act of May 23, 1908, c. 792, 35 Stat. 259, 16 U. S. C. 553.

Following a series of unprecedented forest fires in 1910, which burned millions of acres in Minnesota, Idaho, Washington, and Oregon,[18] Congress decided to broaden the participation of the Forest Service in fire fighting activities. By Section 2 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. 563, the Secretary of Agriculture was authorized to enter into cooperative agreements with states for the organization and maintenance of a system of fire protection on any private or state forest lands situated upon the watershed

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[18] See Guthrie, *Great Forest Fires of America* (U. S. Department of Agriculture 1936), p. 6; *Highlights in Forest Conservation* (U. S. Department of Agriculture Information Bulletin No. 83 (1952)), p. 9.

of a navigable river. And, in 1924, the Secretary's authority was further extended to include cooperative fire protection activities in all "the timbered and forest-producing lands" in "each forest region of the United States." Act of June 7, 1924, c. 348, 43 Stat. 653, 16 U. S. C. 564, 565.

As a result of these statutory provisions, the Forest Service now cooperates with 43 states in providing fire protection on state and private forest lands.[19] This cooperation takes several forms.[20] The Service has underwritten a substantial portion of the cost of needed equipment and training activities. It helps state foresters in the latters' direction of organized fire prevention and control. It conducts nationwide fire prevention campaigns. It does extensive research into techniques and devices that will assist states and private landowners in fire prevention and suppression.

Further, the Service has entered into several agreements whereby it has assumed the function of undertaking the suppression of fires on *all* lands within a particular area, whether federally owned or not. As stated in appellants' complaint, such an agreement was outstanding in the area here involved and by its terms the personnel of the Forest Service were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. And it should be noted that in Washington, as in some other jurisdictions, these wardens have among other duties the control and suppression of forest fires throughout the forest area of the

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[19] Annual Report of the Secretary of Agriculture (1951), p. 18.

[20] See *The Work of the U. S. Forest Service*, n. 16, *supra*, at pp. 12, 18; The Budget of the United States for the fiscal year ending June 30, 1955, p. 343.

state. See Rev. Code Wash. §§76.04.060, 76.04.070. In this capacity, they clearly perform the same functions in relation to the forest area as a municipal fire department performs in relation to the community it serves.

While the statistical data relating to Forest Service fire prevention and suppression activities, as above outlined, cannot tell the whole story, they do give a good picture of the present magnitude of those activities. During the fiscal year 1953, for example, the Service controlled 11,063 forest fires at a cost of more than 5 million dollars and spent approximately 9.5 million dollars in the execution of its cooperative fire protection agreements with state governments.[21] The figures for the preceding year are no less impressive.[22]

B. *The Tort Claims Act Does Not Extend To Claims Grounded Upon The Assertedly Negligent Performance Of A Public Function.*

It is clear from the foregoing that appellants' claim is grounded upon the assertedly negligent performance by the Forest Service of its long-standing and firmly rooted public function in connection with the prevention and suppression of forest fires. Even appellants' complaint itself stresses that this function was here undertaken not as owner of the national forest but rather in the stead of the state fire fighting service and with regard to both public and private lands. The question thus comes down, in the final analysis, to whether the Tort Claims Act permits the imposition of liability upon the United States for the performance of

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[21] Budget, n. 20, *supra*, pp. 338, 339, 343.

[22] See Budget for the fiscal year ending June 30, 1954, pp. 402, 403, 406.

exclusively public activities which do not have a private counterpart.[23] The legislative history of the Act, its express terms, and the decisions of the Supreme Court construing it, indicate beyond doubt that the answer is in the negative.

The Tort Claims Act was passed by the 79th Congress in 1946 as Title IV of the Legislative Reorganization Act—the culmination of "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment." (*United States* v. *Spelar,* 338 U. S. 217, 219-220). Throughout this period, as the Supreme Court observed in *Dalehite* v. *United States,* 346 U. S. 15, 28, the prime legislative effort was to make the United States amenable to suit for automobile accidents—an example constantly repeated throughout the legislative history—and similar "ordinary" "common law" torts, and that purpose was expressly reaffirmed when the Act was passed.[24] Dur-

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[23] That private persons may serve on occasion as state forest wardens by agreement with the State of Washington does not mean that they act in a private capacity or that there is a private counterpart to the activities of the Forest Service here. As the Supreme Court noted in *Labor Board* v. *Jones & Laughlin Co.*, 331 U.S. 416, 429 when a private individual is performing a public function under authority from the state he acts as a public officer and assumes all of the powers and liabilities attaching thereto. See also *Thornton* v. *Missouri Pacific R. Co.,* 42 Mo. App. 58; *Dempsey* v. *New York Central & Hudson River R. Co.,* 146 N.Y. 290, 40 N.E. 867; *New York C. & St. N. R. Co.* v. *Fieback,* 87 Ohio St. 254, 100 N.E. 889; *Neallus* v. *Hutchinson Amusement Co.,* 126 Me. 469, 139 Atl. 671.

[24] See e.g., 67 Cong. Rec. 11092, 11100; 69 Cong. Rec. 2192, 3118; Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill (Feb. 1932), p. 17; Hearings on H.R. 7236, 76th Cong., 3d Sess. (April 1940), p. 16; Hearings on S. 2690, 76th Cong., 3d Sess. (March 1940), pp. 27-8; Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. (Jan. 29, 1942, pp. 28, 37, 39, 66; H. Rept. No. 2428, 76th Cong., p. 3; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5; S. Rep. No. 1400, 79th Cong., p. 31.

ing the same period, it was also the consistent view of Congress that the doors should not be opened to claims based upon acts of a "governmental nature" or, as stated by a member of the House Committee on the Judiciary, to "that class of tort on the part of the Government which has to do with a governmental function, so to speak."[25]

This purpose, that liability was not to be imposed for United States activities undertaken in a special governmental context, was carried out in large measure by the exception in 28 U. S. C. 2680(a) of claims based upon acts or omissions in the exercise of a statute or regulation, or based upon the exercise or performance or the failure to perform a discretionary function or duty. Cf. *Dalehite* v. *United States, supra* at 30-36.[26] But it was also carried out through the vehicle of 28 U. S. C. 2674, read in conjunction with 28 U. S. C. 1346(b). Section 1346(b) confers jurisdiction upon

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[25] Representative Gwynne speaking on H.R. 7236, 76th Cong. (86 Cong. Rec. 12021). See also 67 Cong. Rec. 11086-11100; 69 Cong. Rec. 2191, 2196, 3117, 3127; H. Rept. No. 2800, 71st Cong., p. 9; 86 Cong. Rec. 12021-2; Hearings on H.R. 5373 and H.R. 6463, 77th Cong. (Jan. 1942), pp. 28, 33, 38, 45, 65, 66; S. Rept. No. 1196, 77th Cong., p. 7; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5.

The Supreme Court summarized the legislative history in the *Dalehite* case in these terms [346 U.S. at 28]: "[I]t was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

[26] The 2680(a) exception was "intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any Government agent is shown, *and the only ground for suit is the contention that the same conduct by a private individual would be tortious.*" Statement by Assistant Attorney General Shea, Hearings before the House Committee on the Judiciary, 77th Cong., 2nd Sess. on H.R. 5373 and H.R. 6463, p. 33, quoted in the *Dalehite* opinion, 346 U.S. at 30 (Emphasis supplied).

the district court over claims based on the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, *if a private person,* would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Section 2674 provides that the assumed liability is only "in the same manner *and to the same extent* as a private individual under like circumstances." (Emphasis supplied). See p. 47, *infra.*

If at any time there existed serious doubt that these latter Sections by their terms condition recovery under the Act upon the existence of a parallel private liability, and thereby preclude the possibility of the imposition of liability for the negligent performance of an activity which is uniquely governmental in nature, it was wholly dispelled by the decisions of the Supreme Court in *Feres* v. *United States,* 340 U. S. 135, and *Dalehite* v. *United States, supra.* In the *Feres* case, the Court held squarely that the Act waives the prior immunity from suit only as "recognized causes of action" and "does not visit the Government with novel and unprecedented liabilities" (340 U. S. at 142) and that, as a consequence, recovery will be denied in cases in which "plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States" (340 U. S. at 141).

These principles were applied with specific reference to public firefighting activities in the *Dalehite* case. There the claim was made that the Coast Guard had negligently performed its general public duty to fight the fire resulting from the explosion of fertilizer grade ammonium nitrate at Texas City and the district court,

rendering judgment against the United States, specifically found in this regard that the Coast Guard had been negligent "in failing * * * promptly and quickly" to "discover the fire on the *Grandcamp* * * * to use proper and efficient efforts to extinguish such fire on the *Grandcamp,*" in "failing to remove the *Grandcamp* * * * [and the *Highflyer*] from the Texas City Harbor after fire was discovered thereon and before such explosion thereon," and in failing "to extinguish and prevent the spread of the fires in Texas City." The Court of Appeals reversed but, in doing so, did not discuss the merits of these findings. *In re Texas City Disaster Litigation,* 197 F. 2d 771 (C.A. 5). In its view of the case the degree of care that the Coast Guard exercised was of no consequence in light of the requirement that an analogous private liability be present.

The Supreme Court, in affirming the determination that the circumstances of the Texas City explosion did not impose liability upon the United States, took a similar position in regard to the negligence charged to the Coast Guard. The Court said [346 U.S. at 43-44]:

> *As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.*
>
> ". . . the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with

the rationale of the decision has since been employed to strike down claims grounded upon the assertedly negligent performance of other uniquely public duties. *Indian Towing Company* v. *United States,* 211 F. 2d 886, (C.A. 5) and *National Manufacturing Co.* v. *United States,* 210 F. 2d 263 (C.A. 8) certiorari denied, 347 U.S. 967.

The claim in the *Indian Towing* case was based upon the asserted negligence of the Coast Guard in the maintenance of an aid to marine navigation and the district court dismissed the complaint on the authority of *Dalehite.* On the plaintiff's appeal, the Government observed that in maintaining navigational aids, as in fighting fires, the Coast Guard acts in the interest of the general public welfare. From this, it was urged that no analogous private liability could be found and that, as a consequence, the judgment should be affirmed. In a brief *per curiam* opinion, the Fifth Circuit agreed, stating simply that *Feres* and *Dalehite* were controlling and that "under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed."

In the *National Manufacturing Co.* case, the claim rested on the asserted negligence of government employees in the dissemination of weather and flood information respecting the disastrous overflow of the Kansas River in July 1951, the plaintiffs pointing to several commercial weather forecasting services (*e.g.* Western Union) as providing the requisite private analogy. The district court granted summary judgment to the United States and the Eighth Circuit affirmed. While placing its decision on several alternative grounds, the court gave express recognition to the fact

that the suggested comparison between the Weather Bureau and private forecasting agencies was wholly inapposite and that Sections 2674 and 2680(a), as interpreted by the Supreme Court, barred the claim. It said [210 F. 2d at 277]:

> When the two sections are read in relation, as they must be, it becomes clear that Congress intended to prohibit imposition of liability upon the United States for activities undertaken by the United States in circumstances that are not like but differ in essential character from those in which any comparable private enterprises are carried on. "The Act did not create new causes of action where none existed before." If the activity is purely governmental there can be no liability under the Act which by its terms is conditioned on the liability of a private individual in like circumstances.
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> It is insisted, and we agree, that the information service on flood forecasts which the Weather Bureau is authorized to establish and maintain is a mere incident of the continuing government struggle to control the flooding of the rivers and minimize flood damage. The service is plainly of a governmental nature or function intended for the public at large and wholly for governmental purposes. It is dissociated from any private business counterpart and *is closely analogous to the action all governments must take against common enemies, foreign and domestic or against plagues and epidemics and against conflagrations* * * *.[Emphasis supplied.][29]

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[29] Throughout appellants' brief there are references to the alleged fact that the Government owns and manages the timber lands of

C. *The United States Owed No Actionable Duty to Appellants Under Its Fire Protection Agreement With the State of Washington.*

In an endeavor to avoid the impact of the *Dalehite* decision, appellants contend that the cooperative fire protection agreement between the Forest Service and the State of Washington placed a specific duty in the Government owed to each property owner in the area, for the breach of which liability may be imposed upon the United States. This contention is wholly without merit.

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the national forest in a "proprietary" capacity. These references indicate that appellants completely misunderstand the Government's position as the meaning of 28 U. S. C. 2674, which position was accepted by the Supreme Court in *Dalehite* and then applied in *Indian Towing* and *National Manufacturing*. We have never suggested that Section 2674 was intended to import the governmental-proprietary dichotomy familiar in the area of municipal liability in tort. On the contrary, we have always recognized that, to cite one example, the Act applies to the negligent operation of a government vehicle, irrespective of whether that vehicle was being employed in connection with what, in the case of a municipality, would be deemed a governmental or proprietary function. What we have urged instead is that where a traditionally public function is involved, and where the asserted negligence is in the performance of the function *itself*, Section 2674 prohibits the imposition of liability.

Translated into the terms of the instant case, appellants' claim is barred because it rests on the asserted failure of the Forest Service to extinguish properly the forest fire, the fighting of forest fires being one of the very duties the Forest Service performs (unlike private persons) for the benefit of the public at large. Had the claim rested on damages suffered as the result of a collision between a Forest Service vehicle engaged in fighting the fire, however, it would not have been so barred. In such circumstances, the failure to perform the governmental function of fire suppression would not have been involved. Indeed, from the standpoint of such a claimant, whether the public duty to suppress the fire had been carried out or not would have been of no consequence whatsoever.

As appellants are compelled to concede, the Forest Service, by virtue of the agreement in question, simply undertook certain public responsibilities normally resting upon Washington state forest wardens; *i.e.,* the suppression of fires on the forest lands covered by the agreement. And it perforce follows, even in the absence of the prohibition in *Dalehite* against imposing liability for the performance of public firefighting duties, that at the very most the liability of the Government to third persons in the performance of these transferred public responsibilities will be that of the state had the latter itself retained the responsibility of suppressing fires in the area and acted as the Forest Service did here. Stated otherwise, appellants scarcely can expect that, by taking over a state function, the Forest Service assumes greater potential liability than the state assumes when it performs the function.

The relevant inquiry on this aspect of the case, therefore, is into the extent of the liability of the State of Washington in circumstances where its forest wardens fail to exercise properly their statutory duty (see pp. 28-29, *supra*) to suppress fires developing in forest areas. Appellants fail to point to anything suggesting that there would be any liability whatsoever. And the fact of the matter is that Washington has long followed the universally accepted rule, referred to by the Supreme Court in *Dalehite,* to the effect that the activities of public firemen are conducted for the benefit of the public at large and as such do not create private actionable rights. See *e.g. Lynch* v. *North Yakima,* 37 Wash. 657, 80 Pac. 79; *Cunningham* v. *City of Seattle,* 40 Wash. 59, 82 Pac. 143; *Lawson* v. *City of Seattle,* 6

Wash. 184, 33 Pac. 347. See also *Hagerman* v. *City of Seattle*, 189 Wash. 694, 66 P. 2d 1152, 1156.[30]

It is interesting to compare appellants' position here with that of the plaintiffs in the landmark case of *Moch* v. *Rensselaer Water Co.*, 247 N. Y. 160, 159 N. E. 896 wherein, because of its relation to fire protection, the assertedly negligent performance of a commercial service under contract with a municipality was held not to give rise to liability to private citizens. There, the defendant water company had entered into a contract with the city of Rensselaer to supply water to, *inter alia*, private homes and the city's fire hydrants. While the contract was in force, a warehouse close to Moch's property caught fire. The water company was notified of the fire but allegedly failed "to supply or furnish sufficient or adequate quantity of water, with adequate pressure to stay, suppress or extinguish the fire before it reached [Moch's warehouse]". Moch then brought suit against the water company both in contract and in tort, relying on the provisions of the contract between the water company and the city. The trial court denied a motion to dismiss the complaint. The Appellate Division of the Supreme Court of New York reversed and its determination was then affirmed by the New York Court of Appeals. Judge Cardozo, speaking for a unanimous

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[30] As the court said in the *Lynch* case, [80 Pac. at 80]:

> [I]t may generally be accepted that a city is not liable for an improper discharge by its officers of a purely governmental function * * * the services of [the fire department] are for the benefit of all persons who may have property in the city limits capable of injury by fire. It would seem, therefore, that in creating, maintaining, and operating the fire department the city was exercising governmental functions.

This statement was subsequently approved by the Court in the *Hagerman* case.

court, observed that no actionable duty rests upon a city to supply its inhabitants with protection against fire. As a consequence, a member of the public could not maintain an action by reason of the water company's contract to supply water for fire hydrants, unless the contract showed that the water company had expressly agreed to be answerable to individual members of the public in spite of the fact the city itself would not have been so answerable [159 N. E. at 899]. Judge Cardozo went on to point out, in respect to the action in tort, that the so-called "good samaritan" rule, previously laid down by him in *Glanzer* v. *Shepard,* 233 N. Y. 236, 135 N. E. 275, 276, was not applicable, adding that [159 N. E. at 898, 899]:

> The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with every one who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance without reasonable notice of a refusal to continue, the quality of a tort. There is a suggestion of this thought in Guardian Trust & Deposit Co. v. Fisher, 200 U. S. 57 . . . but the dictum was rejected in a later case decided by the same court German Alliance Ins. Co. v. Homewater Supply Co. 226 U. S. 220 . . . .) when an opportunity was at hand to turn it into law. We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.[31]

[31] It is true, as appellants suggest (Br. p. 59), that contractors with a municipality have been held liable to third persons for negligence in the execution of the contract. As an examination of

D. *The United States Breached No Duty Owing These Appellants By Reason Of Its Ownership Of The National Forest.*

In a further endeavor to escape the effect of the plain holding in *Dalehite,* appellants assert in essence that even if the United States would not otherwise be liable for the acts of the Forest Service in the performance of its public duty to fight forest fires on both private and public lands in the Olympic National Forest area, it is liable for them because of the Government ownership of the national forest. In this connection, they rely on Washington statutes and decisions requiring the owner of property upon which a fire originates to exercise due care to suppress it.

(1) As will be seen below, the provisions of Washington law pointed to by appellants have no relevancy here since the fire derived from acts committed by the Railroad on its right of way. But even if this were not the case, appellants' position would not be advanced.

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the authorities they rely on will reveal, however, this occurs *where the contract calls for the undertaking of improvements to buildings and roads* and not where the contractor has assumed the *performance of a traditional public function such as the providing of police or fire protection* and the protection provided proves inadequate. Thus in *Wolten Grocery Co.* v. *Puget Sound Bridge & Dredging Co.*, 165 Wash. 27, 4 P. 2d 863, the dredging company contractor was held responsible for its negligence in filling in the city streets in a manner which damaged adjoining property.

Insofar as the volunteer fire company cases cited by appellants (Br. p. 60) are concerned, they do not turn to any extent upon the fact that the fire company was under contract with the city. Instead, they merely represent the minority rule, adopted in Connecticut and Rhode Island alone, that a volunteer fireman, as opposed to a paid fireman, can be held accountable for his negligence in the operation of a fire engine. There is, of course, no suggestion in either case that a volunteer fire company also may be held accountable to a property owner for the manner in which it fights a fire.

In the first place, that the United States may have owned land in the area has no bearing whatsoever upon the nature of the function being performed by the Forest Service under the cooperative agreement with the State of Washington. The situation can be readily analogized to that of a municipal fire department which is called upon to suppress fires on all property within its jurisdiction. We do not hear appellants to suggest that the fact that the city may itself own property, or that in the course of a particular conflagration that property may become ignited or endangered, affects the public character of the fire department's duties. It is clear, therefore, that appellants' claim is still one which is grounded upon the assertedly negligent performance of a public fireman and, for this reason, falls within the scope of the *Dalehite* decision.

There is, however, a second and equally fundamental reason why appellants' theory is footless. As they implicitly recognize, it must be demonstrated, in order to recover from the United States under the Tort Claims Act, that a private landowner in the situation of the Government would be liable to third persons in similar circumstances. Put in other terms, appellants must show that, if the national forest were privately owned and the extinguishment of a fire developing thereon was undertaken by the public firefighting body in the area (be it the Forest Service or the state forest wardens), the landowner would be held responsible for the acts or omissions of the fireman in the course of the undertaking.

Appellants cite no authority that will support the novel proposition that a private individual can be held answerable to others for the manner in which public officers and employees carry out their responsibilities

to the public at large.[32] And insofar as we have been able to discover there is none. On the contrary, it is an established principle that an employer is not even liable for the wrongful acts of his own employees when such acts are done in the capacity of a public officer (*e.g.* special policeman) rather than primarily in their capacity as servant. *McKain* v. *B. & O. R. Co.,* 65 W. Va. 233, 64 S. E. 18; and see cases in Note, 23 L.R.A. (N.S.) 289. Cf. n 23, *supra,* p. ~~35~~. 30.

2. Assuming *arguendo* that a private person in any circumstances would be liable for the spread of a fire from his land to adjoining lands due to the negligence of a public fireman, he would not be so liable in the circumstances of this case. For the Washington Supreme Court in delineating the landowner's statutory and common law duty respecting fires *not set by him* has emphasized continually that it arises only in situations where the fire *originates* on his own property. See *e.g. Sandberg* v. *Cavanaugh Timber Co.,* 95 Wash. 556, 164 Pac. 200; *Jordan* v. *Spokane P & S Ry Co.,* 109 Wash. 476, 186 Pac. 875; *Walters* v. *Mason County Logging Co.,* 139 Wash. 265, 246 Pac. 749. And those other jurisdictions in which a landowner has any duty

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[32] Appellants' reliance (Br. p. 72) on *Galbraith* v. *Wheeler-Osgood Co.,* 123 Wash. 229, 212 Pac. 174 and *Wood & Iverson Inc.* v. *Northwest Lumber Co.,* 138 Wash. 203, 244 Pac. 712 is entirely misplaced. As the Supreme Court of Washington took pains to make clear in *Galbraith,* the state forester in burning the inflammable debris on the defendants land "acted in his *individual* and not in his *official* capacity" [212 Pac. at 176] [Emphasis supplied]. The court further indicated that the situation would have been otherwise had the activity not been undertaken by agreement with the defendant. We stress again that here the Forest Service had no agreement with any landowner to provide fire protection on his lands but instead had taken over a state public function in respect to the land of several corporations and individuals. Thus, it was acting in an official capacity, just as the state forest wardens would have been in like circumstances.

at all where the fire was not started by him place the same limitation. See, *e.g.,* cases cited 42 ALR 783, 821 *et seq;* 18 A. L. R. 2nd 1081, 1097.

We have considered in another connection some of the principal reasons why a right of way granted to a railroad is, for the purposes of the statutory and common law obligations resting upon the owner of land, the property of the railroad. See *supra,* pp. 10-16. While we do not discuss them anew at this juncture, we think it is important to note that the reluctance of courts to hold responsible the owner of land upon which a railroad right of way is maintained is not restricted to instances where the claim is rooted in the alleged presence of inflammable materials on the right of way. Cf. p. 14, *supra.* For while there are innumerable cases holding the railroad accountable for its failure to prevent the spread of a fire developing on its right of way—following the very principle that appellants seek to apply against the United States—[33] there has not been to our knowledge a single occasion upon which the possessor of a reversionary interest has been held similarly accountable.[34]

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[33] See *e.g. Jordan* v. *Spokane, P & S Ry. Co.,* 109 Wash. 476, 186 Pac. 875 and cases cited 42 A. L. R. 783, 795, 812 *et seq.;* 18 A. L. R. 2d 1081, 1089, 1091. These cases show that if the fire did not originate through the negligence of the railroad it is liable only for the failure to exercise due care to prevent its spread. Absolute liability generally is imposed in circumstances where the fire was due to improper operation of a locomotive.

[34] For these reasons, the cases cited by appellants (Br. p. 42 *et seq*) holding a municipality liable for the spread of fire originating on its own land have no pertinence in relation to the instant case. It should also be borne in mind that in none of them was the claim grounded upon the failure of public firemen, in the performance of their duties as such, to extinguish a fire started by another. On the contrary, in most instances the fire was deliberately

CONCLUSION

Appellants here would hold the United States liable under the Tort Claims Act for the alleged damage to their property flowing from a fire which they concede was set by an improperly operated Port Angeles Western Railroad locomotive on the Railroad's improperly maintained right of way across the national forest and which, as the complaint itself shows, was fought by the Forest Service in the capacity of a public fireman. As the District Court correctly perceived, their claim has no substance when viewed in the light of the statutory and common law duties of a private landowner in the State of Washington, and in the light of the scope of the Government's waiver of immunity from suit in tort reflected by the Tort Claims Act.

It is respectfully submitted that the judgment of the court below should be affirmed.

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OCTOBER, 1954

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set by employees of the municipality itself for some purpose such as the burning of refuse and the claim was that the city failed to manage the fire properly. Thus these cases might assist appellants if the forest fire here had been set by Forest Service employees to clear off debris from the national forest and then ignored; a far cry from the actual situation wherein the Forest Service sought to extinguish a fire concededly set by the Railroad because it was under a public duty to do so.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The relevant provisions of the Revised Code of Washington are as follows:

Section 4.24.040 (R.R.S. § 5647).

Damages for negligently permitting fire to spread. If any person for any lawful purpose kindles a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property as a prudent and careful man would do, and if he fails so to do he shall be liable in an action to any person suffering damage thereby to the full amount of such damage.

Section 76.04.370 (R.R.S. § 5807)

Abatement of fire hazards—Recovery of cost. Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

If the owner or person responsible for such

hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence.

Section 76.04.450 (R.R.S. § 5818)

Olympic Peninsula area protection. All forests and timber upon all land in the state, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard caused by reason of the unusual quantity of fallen timber upon such land. It shall be unlawful for any person to do any act which shall expose any of the forests or timber upon such land to the hazard of fire.

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